

BEFORE THE HUMAN RIGHTS COMMISSION
AND THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF PUBLIC HEARING ON
ARM 24.8.201, 24.8.203, 24.8.205,)	PROPOSED AMENDMENT AND
24.8.214, 24.9.111, 24.9.119,)	ADOPTION
24.9.121, 24.9.123, 24.9.125,)	
24.9.603, and 24.9.606 and the)	
adoption of New Rules I and II)	
pertaining to Human Rights matters)	

TO: All Concerned Persons

1. On September 23, 2016, at 9:00 a.m., the Department of Labor and Industry (department) and the Human Rights Commission will hold a public hearing in the auditorium of the Sanders Building (DPHHS building), 111 North Sanders Street, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on September 16, 2016, to advise us of the nature of the accommodation that you need. Please contact Annah Howard, Department of Labor & Industry, P.O. Box 1728, Helena, Montana, 59624-1728; telephone (406) 444-4356; fax (406) 444-2798; or e-mail anhoward@mt.gov.

3. The department proposes to amend the following rules, stricken matter interlined, new matter underlined:

24.8.201 FILING OF COMPLAINTS (1) A complaint may be filed with the Human Rights Bureau by or on behalf of any aggrieved party. Complaints must be filed with the Human Rights Bureau by mail addressed to the Human Rights Bureau, P.O. Box 1728, Helena, MT 59624-1728; personal delivery to ~~1625 Eleventh Avenue (USF&G Building, second floor)~~ 33 South Last Chance Gulch, Suite 2B, Helena, MT 59601; or fax to ~~(406) 444-2798~~ (406) 443-3234.

(2) ~~Pursuant to 49-2-501(4)(a), MCA, and subject to 49-2-501(4)(b), MCA,~~ a A complaint must be filed within 180 days after the alleged act of discrimination occurred or was discovered.

(3) A complaint is considered to be filed on the date it is received by the Human Rights Bureau, either by mail, hand-delivery, or facsimile. If the last day of the time limit falls upon a Saturday, Sunday, legal holiday, or the department offices are closed on such day, the time limit will run until the end of the next day when the department offices are open.

(a) In the case of a complaint which is deferred or transmitted to the Human Rights Bureau by any government agency pursuant to any agreement entered into

between the agency and the department, the complaint is deemed filed for the purpose of determining the timeliness of a complaint pursuant to 49-2-501, MCA, as of the date it was filed with the agency which deferred or transmitted the complaint. The time period the Human Rights Bureau has to complete its informal investigation pursuant to 49-2-504, MCA, or for the commission or the department's Office of Administrative Hearings to conduct a hearing pursuant to 49-2-512, MCA, runs from the date the complaint is transferred by the deferring governmental agency to the Human Rights Bureau.

(4) remains the same.

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-210, 49-2-501, 49-2-504, 49-3-315, MCA

REASON: Reasonable necessity exists to modify (1) due to the change in physical location of the Human Rights Bureau and the need for accuracy in the rules. Reasonable necessity exists to modify (3) to clarify timeliness of claims before other governmental agencies and to clarify timeliness of the Human Rights Bureau investigatory or hearings process.

24.8.203 FORM OF COMPLAINTS (1) remains the same.

(2) For the purpose of timely filing, any signed written statement received by mail, hand-delivery, or facsimile may be deemed a complaint if it sufficiently identifies parties and describes the actions being complained of. Such complaint may be verified by amendment after initial filing.

(3) remains the same.

(4) If the charging party does not allege facts sufficient to constitute a short and plain statement of the claim showing that the charging party is entitled to relief under Title 49, chapters 2 and 3, MCA, the Human Rights Bureau will notify the charging party that the department ~~does not have jurisdiction over the complaint~~ will not informally investigate the complaint, and the case will be dismissed unless the charging party amends the complaint to state a valid claim.

(5) and (6) remain the same.

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-205, 49-2-501, 49-2-504, 49-3-315, MCA

REASON: Reasonable necessity exists to modify (2) to clarify that there are multiple ways to transmit signed filings to the Human Rights Bureau, and to avoid confusion in that regard. Reasonable necessity exists to modify (4) to clarify that the Human Rights Bureau does not investigate claims which present insufficient facts to support a claim under the laws enforced by the Human Rights Bureau.

24.8.205 INTAKE PROCEDURE (1) A person ~~claiming~~ seeking to file an unlawful discrimination complaint may contact the Human Rights Bureau by mail or telephone ~~to inquire about filing a complaint of discrimination. Any advice or assistance provided to a potential charging party who contacts the Human Rights Bureau shall be offered objectively and impartially pursuant to 49-2-205, MCA.~~ The

Human Rights Bureau may provide consultation and assistance in filing a complaint through intake. If a person sets forth sufficient information to indicate a viable complaint under the laws enforced by the Human Rights Bureau, the bureau may draft a complaint for the person's consideration. A complaint drafted by the bureau is not deemed filed until it is signed and returned pursuant to ARM 24.8.203.

(2) Any information or assistance provided to a potential charging party who contacts the Human Rights Bureau must be offered objectively and impartially pursuant to 49-2-205, MCA.

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-205, 49-3-315, MCA

REASON: Reasonable necessity exists to modify this rule to clarify for the public the assistive services provided by the Human Rights Bureau, and to make clear that, while the Human Rights Bureau may provide a draft complaint for a complainant's review, such draft is not filed until it is signed and returned. This modification should prevent confusion amongst members of the public who might be unclear as to the difference between discussing possible unlawful discrimination and filing a formal complaint with the Human Rights Bureau.

24.8.214 INVESTIGATIVE SUBPOENAS (1) Pursuant to 49-2-203(3), MCA, ~~a party~~ the Human Rights Bureau may request that the commissioner issue subpoenas relating to a matter under investigation in order to further the department's informal investigation. ~~Such requests shall be directed to the Commissioner, Department of Labor and Industry, P.O. Box 1728, Helena, MT 59624-1728.~~

AUTH: 49-2-204, MCA

IMP: 49-2-203, MCA

REASON: Reasonable necessity exists to amend this rule to correct an incorrect statutory citation, and to clarify that mailed requests to the commissioner are not necessary.

4. The Human Rights Commission proposes to amend the following rules, stricken matter interlined, new matter underlined:

24.9.111 DOCUMENT FORM FORMAT, FILING, AND SERVICE

(1) remains the same.

~~(2) The place of filing is the offices of the Human Rights Bureau, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728. The offices are located at 1625 11th Avenue, Helena, Montana. The telephone number is (406) 444-2884; fax (406) 444-2798; TTY (406) 444-0532.~~

~~(3) Filing with the commission is effective upon actual receipt at the offices of the department and not upon mailing.~~

~~(4) Parties shall submit the original (or original copy) and six copies of all submissions for the record, unless otherwise directed by the commission.~~

(5) remains the same, but is renumbered (2).

~~(6) Filing of a facsimile copy of a document of no more than 20 pages, which is an exact duplicate of the original, shall meet the filing requirements of these rules only if the facsimile copy is followed within five days by filing of the original or original copy of the document and required copies.~~

AUTH: 49-2-204, 49-3-106, MCA

IMP: 2-4-106, 49-2-204, 49-2-511, 49-3-315, MCA

REASON: Reasonable necessity exists to modify this rule to provide for clarity for parties and to provide for a new rule as to the ways documents can be filed with the commission. Substantively, this rule remains the same as to those topics it continues to discuss.

24.9.119 EX PARTE COMMUNICATIONS (1) No member of the commission may participate in or initiate any ex parte communication as defined in (2) on the merits of a matter with any party ~~or the department~~. A member of the commission may engage in a communication concerning administrative or procedural matters where they are necessary under the circumstances and do not adversely affect the substantial rights of a party.

(2) "Ex parte communication" means the act of a party, any person having an interest in the outcome of a contested case, or any other person not authorized by law, communicating with a member of the commission regarding the merits of any contested case, outside the context of a commission hearing or other publicly noticed meeting. Communications which do not constitute discussions or information regarding an issue of fact or law in a contested case, such as discussions of enlargements of time, scheduling, administrative matters, and/or questions of procedure, do not constitute ex parte communications.

(3) The commission, or a member of the commission, may consult with the department regarding any matter coming before the commission. ~~the interpretation of a point of law.~~

AUTH: 49-2-204, 49-3-106, MCA

IMP: 2-4-613, 49-2-204, 49-2-511, 49-3-315, MCA

REASON: Reasonable necessity exists to modify this rule to clarify that members of the commission may consult with department staff as necessary regarding matters coming before the body. Previously, the rule could have been interpreted to prevent such communications.

24.9.121 OBJECTIONS TO DISMISSAL OF COMPLAINT (1) A party who is dissatisfied with a department decision to dismiss a complaint may seek commission review of the decision by filing a written objection within 14 days after the issuance of the notice of dismissal. The objection will be considered at the next commission meeting after conclusion of the briefing schedule, issued in accordance with the following:

(a) An objecting party who wishes to file a supporting brief must file and serve the opening brief within twenty-one days after the department decision to dismiss the complaint.

(b) A responding party who wishes to file a response brief must file and serve the response brief within fourteen days of service of the opening brief.

(c) An objecting party who wishes to file a reply brief must file and serve the reply brief within fourteen days of service of the response brief.

~~(2) A party who makes an objection and wishes to file a supporting brief must file and serve an original and six copies of the brief within five days of filing the objection. Any opposing party who wishes to file an answer brief must file and serve an original and six copies of the brief within ten days of service of the initial brief. A party making an objection who wishes to file a reply brief must file and serve an original and six copies of the brief within ten days of service of an answer brief. If a party making an objection does not file a supporting brief, any opposing party may file a brief in opposition to the objection. Briefs on objections to the dismissal of a complaint may not exceed ten pages in length and comply with the formatting requirements set forth in ARM 24.9.111. Each party's brief should attach copies of any specific exhibits which the party believes are essential in the commission's consideration of the matter.~~

(2) Briefs subject to this rule may not exceed ten pages in length and must comply with the formatting requirements set forth in ARM 24.9.111. Any specific exhibits which the party believes are essential to the commission's consideration of the matter must be attached to the party's brief. Briefs must be filed in accordance with [New Rule II].

~~(3) Requests for oral argument must be made in writing at the time of filing the first brief of each party. If the request is contained in a brief, the caption should indicate that oral argument is requested. If a request for oral argument is timely made, ten minutes for each party will be reserved for oral argument during at the commission meeting at which the objection will be considered. The commission may request that the parties present oral argument.~~

~~(4) The objection will be considered at the next commission meeting after conclusion of the briefing schedule. Consideration of the objection will be based upon the written record unless oral argument is requested by a party and authorized by the commission. The commission may request that the parties present oral argument. For the purposes of review of objections to a dismissal of a complaint, the written record is comprised solely of the Final Investigative Report of the department, the objection, the briefing of the parties pursuant to this rule, and any attachments to that briefing.~~

~~(5) and (6) remain the same.~~

(7) If the commission affirms the dismissal of a complaint, it will issue a written order to the parties within 90 days of the hearing on the matter notify the parties of its decision in writing within seven days. The charging party has 90 days after receipt of the commission's order affirming the dismissal of a complaint to file the complaint in the appropriate district court.

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-204, 49-2-511, 49-3-315, MCA

REASON: Reasonable necessity exists to modify (1) to clarify when objections need to be made. Modifications to that rule additionally prevent a problem which has arisen, which is that parties will wait until the last minute to file objections so as to lengthen the period of time available to brief the matter. By setting a briefing deadline based upon the issuance of the final investigative report, it is hoped that parties will be less likely to miss appeal deadlines, and better able to strategize their appeals. Reasonable necessity exists to modify (2) to provide clarity as to what should be incorporated into briefs regarding objections to final investigative reports, and to align with new filing requirements and guidelines. Reasonable necessity exists to modify (3) to clarify that the commission is entitled to request parties present oral argument, should they so choose. Reasonable necessity exists to modify (4) to clarify the record upon which review will be based. Because there is no presentation of evidence, parties have previously been unclear what would be considered by the commission, and what should be submitted with briefing. Reasonable necessity exists to modify (7) to clarify existing practice, which is to issue commission orders within 90 days of the hearing on a matter.

24.9.123 APPEAL OF HEARING OFFICER DECISIONS (1) remains the same.

(2) A party that wants to appeal shall ~~provide~~ file a notice of appeal to the commission ~~and all parties~~ within 14 days of the issuance of the ~~notice of the~~ hearing officer decision. A party requesting review of the transcript must so state in the party's notice of appeal. ~~All appellants shall submit an original (or original copy) and six copies of all submissions for the record unless otherwise directed by the commission.~~

(3) remains the same.

(4) ~~The commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer decision but may not reject or modify the findings of fact unless the commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.~~

~~(a) A party asserting that a finding of fact is clearly erroneous must identify the specific finding that is in error and then cite to the portion or portions of the record that support the party's assertion that the finding is erroneous.~~

~~(b) A party asserting that a damage award is clearly erroneous must point out the findings that are in error and then cite to the portion or portions of the record that support a different calculation of the damages. If a party is asserting an alternative amount for monetary relief, the proposed amount and its method of computation must be set out in the supporting brief and supported by citations to the record. The commission may deny an appeal on the issue of damages if a party fails to specify the amount of damages sought or if a party fails to support that amount with references to the record.~~

~~(c) The commission may grant all relief permitted by 49-2-506, MCA, including full affirmative relief.~~ The standards of review of appeals of hearing officer decisions are as follows:

(a) The commission reviews conclusions of law and interpretations of statutes and administrative rules for correctness. The commission may reject or modify a conclusion of law if it determines that the hearing officer misapplied fact to law or incorrectly interpreted or applied the law.

(b) The commission reviews findings of fact to determine whether substantial evidence exists to support a particular finding. The review must be based upon review of the complete record. While the hearing officer is entitled to some deference in findings of fact, weighing of evidence, and credibility determinations, the commission may reject or modify a finding of fact if it determines that such finding is clearly erroneous or not based upon competent substantial evidence. The commission may additionally reject or modify findings of fact if it determines that the proceedings on which the findings were based did not comply with essential requirements of law.

(c) The commission reviews damage awards to determine if they are clearly erroneous. A party asserting that a damage award is clearly erroneous shall specifically cite the portions of the record supporting that claim. A party asserting an alternative monetary award shall cite the portions of the record which support such alternative calculation. The commission may deny an appeal on the issue of damages if it fails to comply with this subsection.

(d) The commission may grant all relief permitted by 49-2-506, MCA, including full affirmative relief.

(5) Unless all parties stipulate otherwise, a party filing an appeal requiring commission review of the complete record must file six copies of all contested case prehearing submissions, hearing exhibits, a transcript of the hearing, all posthearing submissions, and the hearing officer decision. A party filing an appeal not requiring commission review of the complete record must file six copies of all portions of the contested case record, including the hearing officer decision, required for the commission's review of the appeal. The complete record for the purposes of this rule is comprised of all documents cited or referred to in briefing before the commission. If a party intends to challenge any finding of fact of the hearing officer, the complete record additionally includes the transcript of the hearing.

(a) The party citing or referring to a document in its briefing is required to attach as an exhibit to its brief the entirety of such document. If a party fails to attach required documents to its briefing, the commission may deny the appeal.

(b) Documents which may be included in the complete record are those enumerated at 2-4-614, MCA. Failure of a party to submit documents enumerated in that statute constitutes a stipulation by that party that the commission need not review those documents.

(c) Exhibits not admitted at hearing may not be attached to briefs on appeal, unless the failure to admit such exhibit is a reason for appeal. On timely motion by any party, any exhibit improperly attached may be stricken from the appeal.

(6) If an appellant does not intend to file a transcript of the hearing, the appellant must file and serve a supporting brief and the portions of the record required for commission review of the appeal within 20 days of service of the appealing party's notice of appeal. Any opposing party must file and serve an answer brief within ten days of service of the brief supporting the appeal. The appellant must file and serve any reply brief within ten days of service of the answer

brief. The briefing schedule before the commission for appeals of hearing officer decisions must conform substantially with the following:

(a) If review of the transcript has been requested, the appellant shall file an original and an electronic version of the transcript with the commission within 28 days of filing the notice of appeal.

(b) The appellant shall file an original and an electronic version of its opening brief within 21 days of the filing of the transcript or, if no review of the transcript has been requested, within 21 days of the filing of the notice of appeal. Failure to file an opening brief may result in summary denial of the appeal sua sponte or on motion of any party.

(c) The appellee shall file an original and an electronic version of its response brief within 14 days of service of the opening brief.

(d) The appellant shall file an original and electronic version of its reply brief, if any, within 14 days of service of the response brief.

~~(7) If an appellant intends for the commission to review a transcript, and a transcript of the hearing has not been prepared prior to issuance of the hearing officer decision, the appellant must file notice of intent to file a transcript with the notice of appeal stating that commission review of a transcript of the hearing is required.~~

~~(a) After the notice of intent to file an appeal is filed, the appellant must arrange for preparation of a transcript of the hearing at his or her own expense. The appellant must file an original and six copies of the transcript with the commission within 40 days of filing the notice of intent to file an appeal.~~

~~(b) If more than one party gives notice of intent to file an appeal, all parties filing an appeal which require review of a transcript of the hearing must share equally in the cost of the transcript and copies.~~

~~(c) The appellant must file a supporting brief and the record within 20 days of the date of filing the transcript. Any opposing party must file and serve an answer brief within ten days of service of the supporting brief. The appellant must file and serve any reply brief within ten days of service of the answer brief. The following requirements apply to the preparation of the transcript:~~

(a) A transcript must be prepared by an impartial person with no affiliation to any party and with no interest in the outcome of the contested case. A transcript must be a verbatim and complete account of all proceedings on the record of the hearing and must be in the form commonly accepted by the courts of record of this state. The preparer of a transcript shall certify that the transcript is a complete and accurate account of the stenographic or electronic recording of the hearing and that the preparer has no affiliation with any party and has no interest in the outcome of the contested case.

(b) Preparation of the transcript is the responsibility of the party requesting review of the transcript. If more than one party requests review of the transcript, all parties requesting the review shall share equally in the cost of the transcript and copies.

~~(8) Except upon stipulation of all parties, a transcript shall be prepared by an impartial person with no affiliation to any party and with no interest in the outcome of the contested case. A transcript shall be a verbatim and complete account of all proceedings on the record of the hearing and shall be in the form commonly~~

~~accepted by the courts of record of this state. The preparer of a transcript shall certify that the transcript is a complete and accurate account of the stenographic or electronic recording of the hearing and that the preparer has no affiliation with any party and has no interest in the outcome of the contested case.~~

~~(9) If an appellant fails to file a brief in support of the appeal within the time provided by this rule, or within any extension of time granted, any opposing party may move to strike the appeal. If an opposing party fails to file a brief in opposition to appeal within the time provided by this rule, or within any extension of time granted, that party will not be heard at oral argument except by permission or at the request of the commission. Each party is permitted one-half hour of argument before the commission for each appeal. The appellant may reserve a portion of that time for rebuttal. Oral argument may be waived by the parties, except where it is requested by the commission.~~

~~(10) (9) When a party has timely filed an appeal of a hearing officer decision and has timely filed a supporting brief, the commission will fix a date, not later than 120 days from the notice of appeal, to provide the parties an opportunity to present oral argument to the commission. Each party is allowed a total of one-half hour of argument before the commission, including cross-appeals. Oral argument may be waived by the parties, except where it is requested by the commission.~~

~~(11) A member of the commission may consider procedural motions and enter procedural orders as necessary for commission review.~~

~~(12) A member of the commission may conduct a prehearing conference prior to the commission's consideration of the appeal.~~

~~(13) (10) The commission shall render a decision which affirms, rejects, modifies, and/or remands the hearing officer decision within 90 days of the hearing of the appeal. The final decision of the commission is the final agency decision.~~

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-204, 49-2-505, 49-2-506, 49-2-511, 49-3-315, MCA

REASON: Reasonable necessity exists to modify (2) to clarify requirements for appeals from hearing officer decisions, and to conform with other filing requirements. Reasonable necessity exists to modify (4) to clarify standards of review applicable to appeals of hearing officer decisions, and to clarify what information must be provided by parties to the appeal. Reasonable necessity exists to modify (5) to clarify for the parties the meaning of "complete record" for the purpose of review of hearing officer decisions, and to define for the parties those documents which must be submitted on appeal for proper and thorough review by the commission. Reasonable necessity exists to modify (6) to conform briefing periods in these rules to those in the rules of civil procedure, namely by using a calendar week period for deadlines. Further, this modified rule provides greater clarity as to timelines when transcript review is involved and when such review is not required. Reasonable necessity exists to modify (7) to clarify the responsibility of the parties with regard to preparation of the transcript. Reasonable necessity exists to modify (8) to clarify existing practice that a party may reserve a portion of time for rebuttal. Substantively, the rule has been moved from (10) to (8) for the purpose of clarity. Reasonable necessity exists to modify the old (9) because its substance has been moved to (6) to provide greater

clarity, and to contain provisions relating to briefing in a single section of the rules. Reasonable necessity exists to modify (10), now (9), to remove language which is duplicative of statute, at 49-2-505(5), MCA, and to remove language relating to oral argument, which has been moved to another section. Reasonable necessity exists to eliminate (11) because it is duplicative of language contained in ARM 24.9.103(3). As such, its elimination tends toward a reduction in the rules. Reasonable necessity exists to eliminate (12) to reflect current practice that such conferences do not take place, and to provide clarity to parties not to expect a prehearing conference. Reasonable necessity exists to modify (13) to renumber it as (10) to keep consistent numbering within the rule as a whole.

24.9.125 COMMISSION HEARINGS (1) through (3) remain the same.

(4) Following hearing, the chair of the commission, or any member acting in the chair's stead, shall issue the final order of the commission. At that member's discretion, the final order may be referred to the immediately subsequent hearing of the commission. At that time, the commission's review is limited to whether the proposed order complies with the motions made by the commission previously.

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-204, 49-2-511, 49-3-315, MCA

REASON: Reasonable necessity exists to insert (4) to clarify the way in which commission orders are reviewed prior to their issuance. The review of orders is procedural, and therefore occurs by the action of a single member. This new section clarifies existing practice, and does not modify it. The rule additionally provides explicitly that the reviewing commissioner may refer the order back to the commission as a whole for review if the commissioner believes that such review is necessary. Review under those circumstances is limited to a determination of whether the order complies with the previous determination of the commission. It does not provide for a second review of the specifics of the matter.

24.9.603 RETALIATION AND COERCION PROHIBITED (1) remains the same.

(2) Significant adverse acts are those that would dissuade a reasonable person from engaging in a protected activity. This may include the following:

(a) through (3) remain the same.

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-301, 49-3-209, MCA

REASON: Reasonable necessity exists to modify the section to provide a general definition of what constitutes a "significant adverse act" prior to providing examples of the same. This change should clarify for the public what might constitute retaliation or coercion, and should assist in appropriate review of the facts at hand.

24.9.606 FAILURE TO MAKE REASONABLE ACCOMMODATION--
EMPLOYMENT DISCRIMINATION BECAUSE OF A DISABILITY (1) It is an

unlawful discriminatory practice for an employer, agent of an employer, employment agency, or labor organization to:

(a) fail to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, employment applicant, or union member with a physical or mental disability ~~unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business in question~~; or

(b) deny equal employment opportunities to a person with a physical or mental disability because of the need to make a reasonable accommodation ~~to the person's disability so that the person can perform the essential functions of an employment position.~~

(2) A person with a physical or mental disability is qualified to hold an employment position if the person can perform the essential functions of the job with or without a reasonable accommodation for the person's physical or mental disability. ~~If an employer has prepared a written description before advertising or interviewing applicants, the description is evidence of the essential functions of the job.~~

(3) through (7) remain the same.

~~(8) Independent assessment of the risk of substantial harm is evaluation by the employer of the probability and severity of potential injury in the circumstances, taking into account all relevant information regarding the work and medical history of the person with the disability before taking the adverse employment action in question.~~

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-101(15), 49-3-101(3), 49-3-202, ~~49-3-210~~, MCA

REASON: Reasonable necessity exists to modify (1) because the language regarding undue hardship is duplicative of language in (4), and the rule is clearer when it describes discrimination separately from defenses thereto. Reasonable necessity exists to modify (2) to preclude the notion that, by listing a single form of evidence as to essential functions, the public is not misled to believe it is the only such form of evidence. Reasonable necessity exists to strike (8) because New Rule I, which provides significantly further detail, is proposed to be adopted.

5. The Human Rights Commission proposes to adopt the following new rules:

NEW RULE I DIRECT THREAT (1) Direct threat means a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.

(2) An employer that takes an adverse action against a person with a disability on the grounds that the person with a disability poses a direct threat shall perform an independent assessment of the risk of harm before taking the adverse employment action in question.

(3) A determination that an individual poses a direct threat must be based on an individualized assessment of the individual's present ability safely to perform the essential functions of the job. The assessment must be based on an evaluation of

the employee, taking into account all relevant information regarding work and medical history. Assessment of medical history must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (a) the duration of the risk;
- (b) the nature and severity of the potential harm;
- (c) the likelihood that the potential harm will occur; and
- (d) the imminence of the potential harm.

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-101, 49-3-101, MCA

REASON: Reasonable necessity exists to create this new rule to provide further guidance as to when a direct threat does or does not exist. While the rule has been embodied in statute and rule for some time, this new rule should provide greater clarity as to factors for consideration of a direct threat.

NEW RULE II FILINGS WITH THE COMMISSION (1) Any document required or permitted to be filed with the commission may be filed in three ways: hard copy, electronically, or telephonic facsimile (fax). In all instances, a hard copy original must be provided as indicated in (4) and (5).

(2) Electronic filing must take the following form:

(a) The electronic mail address for document filing is hrcappeals@mt.gov. Documents to be filed by e-mail must be attached to the e-mail in Portable Document Format (.pdf). Attachments larger than eight megabytes cannot be accepted. Filings may be submitted in multiple attachments if necessary.

(b) Documents may also be filed electronically by storing them on a compact disc and filing that compact disc with the commission, as stated in (5).

(3) For facsimile filing, the number is (406) 443-3234. Documents which are longer than twenty pages, inclusive of attachments and exhibits, may not be filed by fax.

(4) Hard copy filings or filings of compact discs may be mailed to: Human Rights Bureau, Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728; or delivered by hand to 33 South Last Chance Gulch, Suite 2B, Helena, Montana 59601.

(5) If filing is made by e-mail or fax, a hard copy original of the identical document must be received by the commission not more than five days following the filing. If such original is not received and good cause is not shown, the e-mail or fax filing will be stricken from the record.

(6) A document is filed, no matter how it is transmitted, on the date it is received by the commission, not the date it is mailed. It is the responsibility of the filing party to ensure that documents are timely received by the commission.

(7) Notwithstanding any other rule to the contrary, any party may request to file documents solely in hard copy by filing a motion to that effect with the commission. The commission may grant such request for good cause shown.

AUTH: 49-2-204, 49-3-106, MCA

IMP: 49-2-204, 49-2-505, 49-2-511, MCA

REASON: Reasonable necessity exists to create this new rule to provide modification of previous filing rules and clarification of the current needs of the commission with regard to filing of documents. Specifically, while the commission previously required the filing of multiple hard copies of all documents, such a requirement no longer reflects the electronic review of documents undertaken by the commission. Therefore, while a single hard copy remains required for the purpose of retaining an original signed filing and to ensure a backup of all filings, filings moving forward, absent good cause, should additionally be filed electronically. Electronic filing is a reflection of current practice with respect to the commission.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Annah Howard, Department of Labor and Industry, P.O. Box 1728, Helena, Montana, 59624-1728; telephone (406) 444-4356; fax (406) 444-2798; or e-mail anhoward@mt.gov, and must be received no later than 5:00 p.m., October 7, 2016.

7. An electronic copy of this notice of public hearing is available through the department's web site at <http://dli.mt.gov/events/calendar.asp>, under the Calendar of Events, Administrative Rules Hearings Section. The department strives to make the electronic copy of this notice of public hearing conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the department and the boards and commissions that are attached for administrative purposes. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program or areas of law the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1315 E. Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, e-mailed to mcadwallader@mt.gov, or may be made by completing a request form at any rules hearing held by the agency.

9. The department's Office of Administrative Hearings has been designated to preside over and conduct this hearing.

10. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

11. With regard to the requirements of 2-4-111, MCA, the commission and the department have determined that, because the rules simply clarify existing law and rules relating to the Montana Human Rights Act, there should not be a significant and direct impact on small businesses.

12. The department and the commission each will respond to public comments, and adopt final rules independently at their own discretion.

/s/ Mark Cadwallader
Mark Cadwallader
Alternate Rule Reviewer

/s/ Dennis Taylor
Dennis Taylor
Chair
Human Rights Commission

/s/ Pam Bucy
Pam Bucy
Commissioner
Department of Labor and Industry

Certified to the Secretary of State August 22, 2016.